United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1667

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FOR THE SECOND CIRCUIT

Docket 74-1667

FAIRMONT SHIPPING CORP. and FAIRWINDS OCEAN CARRIERS CORP., OWNERS OF THE STEAMSHIP WESTERN EAGLE,

Plaintiffs-Appellees,

—against—

CHEVRON INTERNATIONAL OIL COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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Statement

The defendant-appellant Chevron International Oil Company (Chevron) appeals from the Honorable Lloyd F. MacMahon's opinion and judgment entered in the United States District Court for the Southern District of New York on March 11 and 21, 1974, respectively, wherein the Court, after a trial without a jury, held that Chevron breached its warranty of workmanlike service to plaintiffs-appellees Fairmont Shipping Corporation and Fairwinds Ocean Carriers Corporation (Owners) owners of the steamship WESTERN EAGLE, when the tugs furnished by Chevron failed to assist WESTERN EAGLE while the vessel was in the Scheldt River approaching Flushing Harbor on December 14, 1969

which resulted in her stranding and causing her to be damaged. The Court awarded damages, interest and costs in favor of Owners.

Issues Presented

Chevron raises no issue of fact on this appeal, and appeals only from well established legal principles upon which the Court below predicated Chevron's liability to WESTERN EAGLE's owners.

Point I incorrectly suggests that there can be no warranty of workmanlike service in a contract for tug assistance.

Point II is an indirect attack on the Court's finding of fact that the stranding of WESTERN EAGLE was caused by the tugs' failure to assist WESTERN EAGLE (App. 304a).

Point III is an argument, rejected by Judge MacMahon, that WESTERN EAGLE was negligent in proceeding in the Scheldt River with a strong wind and tide effecting her navigation (App. 311a).

POINTS

I.

The Court below properly held that Chevron warranted the workmanlike services of the tugs.

Chevron does not challenge that a contract for tug assistance existed between Chevron and WESTERN EAGLE's owners but contends that it is not a contract for "towage" and that it was error for the Court to imply a warranty of workmanlike service.

Chevron argues that a contract for tug assistance to a vessel does not imply a warranty of workmanlike service. But the very essence of the service to be rendered dictates that there be one. In *James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.* (2 Cir., 1957) 245 F. 2d 84, 87 this Court said:

> "Competency and safety were essential elements of the towing service undertaken by the respondent-impleaded. The very nature of the towing agreement implied a 'warranty of workmanlike service that is comparable to a manufacture's warranty of the soundness of its manufactured product'. Ryan v. Pan-Atlantic Corp., supra, 350 U.S. [124] at pages 133-134, 74 S. Ct. at page 237."

The tide and wind conditions in the Scheldt River at the time the assistance was to have been rendered made tug assistance necessary for a vessel of WESTERN EAGLE's size maneuvering at slow speed. The expertise of the tugs was essential in keeping her in the proper position while approaching the harbor and to provide the rudder effect and power WESTERN EAGLE required to maneuver in the strong wind and tide. The Court below found "that the tugs, and only the tugs, could have prevented the stranding" (App. 307a) and properly held that:

> "The presence and extent of the warranty and its breach, if any, depends upon the circumstances of the particular case relating to control, supervision and expertise. [Citations omitted] The Supreme Court, in the stevedore cases, established the rule that 'liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury'. Italia Societa per Azione di Navi-

gazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964) (Italia)" (App. 298a)

In *Italia,* the Supreme Court did not say that control was a necessary element of the warranty but alluded to control as one of the factors demonstrating that the stevedore was "in a far better position than the shipowner to avoid the accident" (p. 323). The Supreme Court based its decision on the principle that liability shall fall upon the party best situated to adopt preventative measures and thereby reduce the likelihood of injury (p. 324). This Court applied that principle in *Guarrocino* v. *Luckenback Steamship Co.,* (2 Cir., 1964) 333 F. 2d 646 and *Massa* v. *C.A. Venezuelan Navagacion,* (2 Cir., 1964) 332 F. 2d 779.

Judge MacMahon followed the principle set forth in the warranty cases, examined all of the factors, and concluded that Chevron was in the best position to prevent the stranding of the WESTERN EAGLE (App. 299a, 307a). Chevron does not challenge the findings of fact upon which that conclusion is predicated.

II.

The failure of the tugs to perform is an inexcusable breach of the warranty of workmanlike service.

(1) In an attempt to excuse the failure of the tugs to be in the customary position, a mile west of the harbor to which WESTERN EAGLE was proceeding, Chevron attacks the Court's finding that it was normal practice to meet ships there. The tug captain's admission that was normal practice amply supports the Court's finding (App. 305a). The tug captain's explanation for his failure to proceed to the vessel meeting place was that he assumed that be-

cause the weather was bad the vessel would anchor in Flushing Roads (App. 305a). That false assumption cannot excuse the failure to proceed to the customary position for rendering assistance.

The finding with respect to the failure of the tugs to be on station waiting for WESTERN EAGLE is not clearly erroneous and should not be disturbed.

(2) The Court's finding that

> "there was ample room between the WESTERN EAGLE and the northern shore for the coasters to pass, as they did, without incident" (App. 306a)

rejects Chevron's contention that the tugs were in danger and justified in abandoning WESTERN EAGLE. On that finding, WESTERN EAGLE was about in mid-river (See plaintiffs' Exhibit 4, App. 176a) when the tugs first arrived and were in position to assist her. There was more than a quarter of a mile on either side of WESTERN EAGLE for the coasters to pass clear without risk of collision. There was no emergency nor risky alternative confronting the tugs. Had they remained in position, WESTERN EAGLE would have been able to maneuver and maintain her position in mid-river until the coasters had passed, allowing all the vessels to navigate safely clear of each other and avoid the inevitable set of WESTERN EAGLE onto the dike.

There was no speculation on the part of the Court in reaching its decision. The facts amply support the conclusion reached by the Court that

> "The tugs' duty to perform under the contract included the obligation to carry out, if possible, all orders given them by the pilot during the performance of their duties. [Citations omitted] This the tugs failed to do." (App. 307a)

III.

Chevron failed to prove any fault attributable to WESTERN EAGLE's navigators.

Chevron called Captain Spanjer Fjeerd, a Dutch master mariner and an experienced Scheldt River pilot as an expert witness to testify at the trial. He found no fault with WESTERN EAGLE's navigation and testified that she was "entitled to proceed" (App. 151; 309a).

It is clear from the Court's opinion, that all of the evidence was carefully weighed before the Court concluded that

> "defendant has utterly failed to demonstrate that the condition of the WESTERN EAGLE, or any conduct by her master or crew hindered or prevented the tugs from performing in a workmanlike manner." (App. 311a)

Conclusion

The decision below should be affirmed.

Respectfully submitted,

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Dated: New York, New York
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